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Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 2 4 27 AM '04

In the Matter of

Extending Wireless Telecommunications
Services to Tribal Lands

WT Docket No. 99-266

THIRD REPORT AND ORDER

Adopted: August 18, 2004

Released: September 2, 2004

By the Commission: Commissioners Copps and Adelstein issuing separate statements.

I. INTRODUCTION

1. In this *Third Report and Order*, we modify limited aspects of the rules previously adopted in this proceeding¹ to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands.² In the *First Report and Order*, the Commission adopted rules to grant bidding credits to winning bidders who deploy facilities and provide service to federally-recognized tribal areas that have a wireline telephone subscription or penetration rate equal to or below 70 percent.³ We also requested comment on whether the bidding credits program should be expanded beyond its present scope.⁴ In the *Second Report and Order*, we addressed issues raised in the *First Report and Order*, and clarified rules previously adopted in this proceeding.⁵ We also sought comment on potential adjustments to the tribal lands bidding credit program to encourage further deployment by carriers of wireless services on tribal lands.⁶ In this *Third Report and Order*, we address issues raised in the *Second Report and Order*

¹ In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000) ("*First Report and Order*" or "*First Further Notice*," as appropriate).

² Section 1.2110(f)(3)(i) of the Commission's rules provides that a qualifying tribal land is any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than seventy (70) percent based on the most recently available U.S. Census Data. 47 C.F.R. § 1.2110(f)(3)(i) (2003).

³ The "telephone penetration rate," or telephone subscribership rate, represents the actual percentage of households that subscribe to telephone service. See *Telephone Subscribership in the United States (Data Through July 2003)* (rel. January 2004), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/subs0703.pdf.

⁴ See *First Further Notice*, 15 FCC Rcd at 11,816, para. 65.

⁵ In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775 (2003) ("*Second Report and Order*" or "*Second Further Notice*," as appropriate).

⁶ *Second Further Notice*, 18 FCC Rcd at 4783, para. 20. Since the program's inception in 2000, the Commission has conducted 17 auctions, and received 34 applications seeking a tribal land bidding credit. Of those 34 applications, six have been granted, six are pending, and the remaining applicants have withdrawn their request for a tribal lands bidding credit.

and make limited modifications to the existing rules. Specifically, we raise the wireline telephone penetration rate at which tribal lands are eligible for a bidding credit from 70 percent or less, to 85 percent or less, and increase the amount of the bidding credit available to carriers that pledge to deploy on and serve qualifying tribal lands. We believe that these modifications, together with the Commission's targeted outreach efforts and commitment to consult with tribal governments on those telecommunications issues that uniquely affect Indian Country, will further our goal of ensuring that tribal lands have access to affordable, quality telecommunications services.

II. BACKGROUND

2. In its *First Report and Order*, the Commission established the tribal lands bidding credit program and limited availability of the credit to federally recognized tribal areas with telephone penetration rates equal to or less than 70 percent.⁷ The Commission concluded that the bidding credits would assist tribal communities with the greatest need for access to telecommunications service.⁸ The *First Report and Order* also provided that, in order to obtain a bidding credit in a particular market, a winning bidder must indicate on its long-form application (FCC Form 601) that it intended to serve tribal lands in that market.⁹ Following the long-form application filing deadline, the applicant was provided an additional 90 calendar days¹⁰ beyond the deadline to amend its application to identify the tribal lands to be served, and provide certification from the tribal government(s).¹¹ In order to ensure that applicants awarded bidding credits actually deploy facilities and provide service to tribal lands, the Commission also imposed performance requirements on licensees that received a tribal lands bidding credit. Specifically, the Commission required that a licensee construct and operate its system to cover 75 percent of the population of the qualifying tribal land within three years of the grant of the license.¹²

3. In the *First Further Notice* of this proceeding, the Commission sought comment regarding whether it should award bidding credits to carriers who commit to serve non-tribal areas with a 70 percent or less penetration rate, or tribal and/or non-tribal areas with penetration levels above 70 percent but significantly below the national average.¹³ The Commission also sought comments on whether it should expand the program to give transferable bidding credits to be used in future auctions to

⁷ *First Report and Order*, 15 FCC Rcd at 11,802, para. 22.

⁸ *First Report and Order*, 15 FCC Rcd at 11,802, para. 22.

⁹ *First Report and Order*, 15 FCC Rcd at 11,805, para. 31.

¹⁰ As noted *infra*, the Commission, on its own motion, subsequently extended the grace period to 180 days. See *Second Report and Order*, 18 FCC Rcd 4775, 4779 para. 10; see also 47 C.F.R. § 1.2110(f)(3)(ii)(A) (2003).

¹¹ In particular, applicants must provide certification from the applicable tribal government that: (1) it will allow the bidder to site facilities and provide service on its tribal land(s), in accordance with our rules; (2) it has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate against any carrier; and (3) its tribal land is a qualifying tribal land as defined in Commission rules. In addition, at the conclusion of the grace period, the applicant was required to amend its long-form application to file a certification that it would comply with the bidding credit build-out requirement, and that it would consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. *First Report and Order*, 15 FCC Rcd at 11,805-06, para. 32.

¹² *First Report and Order*, 15 FCC Rcd at 11,806-07, para. 35. The Commission also required that, at the conclusion of the three-year period, licensees file a notification of construction indicating that they have met the 75% construction requirement on the tribal lands for which the credit was awarded. If the licensee fails to comply with any condition, it is required to repay the bidding credit plus interest thirty days after the conclusion of the construction period. In the event the licensee fails to repay the amount, the license automatically cancels. *Id.* at 11,807, para. 37.

¹³ *First Further Notice*, 15 FCC Rcd at 11,816, paras. 66-67.

existing and established licensees that deploy and provide wireless service to un-served tribal communities.¹⁴ Finally, the Commission asked whether it should make credits available to licensees that enter into partitioning agreements with tribal authorities that allow the tribal government to provide service, either directly or through negotiation, with a third-party carrier.¹⁵

4. The Commission's *Second Report and Order* modified and clarified aspects of the bidding credit procedures and responded to specific issues raised in the *First Further Notice*. First, the Commission extended the deadline for obtaining the certifications from the applicable tribal governments from 90 to 180 days.¹⁶ The *Second Report and Order* also clarified that if a license is assigned to another entity, the construction/repayment obligations associated with the credit are transferred to the assignee as well, although assignees need not seek re-certification from tribal authorities.¹⁷ With regard to partial license transfers involving geographic partitioning, the Commission clarified that the tribal land must be wholly contained within either the assignor's or assignee's proposed license area after the partition.¹⁸ Additionally, in order to verify compliance with the tribal lands construction requirement, the Commission required licensees to file an attachment along with their notification of construction, stating that it is providing coverage to 75 percent of the population of the tribal area for which the credit was awarded.¹⁹ Finally, the Commission expressly codified penalties for failure to comply with build-out requirements, and failure to timely repay the bidding credit.²⁰

5. The Commission also determined that it would be premature to extend the tribal lands bidding credit program to non-tribal areas or areas with penetration rates greater than 70 percent but still below the national average. The Commission noted both the lack of comments on this issue, as well as the infancy of the program.²¹ The Commission also declined to extend the program to already-licensed carriers or to make the credit transferable, concluding, once again, that a limited record and insufficient time frame within which to assess the effectiveness of the program, did not support such an expansion.²² Finally, the Commission concluded that it would not make bidding credits available to carriers that enter into partitioning agreements with tribal governments as a result of the lack of support in the record for the

¹⁴ *First Further Notice*, 15 FCC Rcd at 11,816-17, paras. 68-69.

¹⁵ *First Further Notice*, 15 FCC Rcd at 11,818, para. 72.

¹⁶ *Second Report and Order*, 18 FCC Rcd at 4779, para. 10. A winning bidder now has 180 days to amend its long-form application to identify the tribal land it seeks to serve, and to provide the required certification from the tribal government. The winning bidder also has 180 days to file a certification that it will comply with the tribal lands build-out requirements, and consult with the tribal government regarding the siting of facilities and deployment of service on tribal lands.

¹⁷ *Second Report and Order*, 18 FCC Rcd at 4779-80, para. 11. The Commission, however, cautioned assignees that the tribe may not allow the assignee to deploy facilities on its land. *Id.*

¹⁸ The construction/repayment obligation will attach to the license for the partitioned area encompassing the tribal land for which the credit was awarded. The Commission noted, however, that in partial license transfers involving spectrum disaggregation (but not partitioning), the construction/repayment obligation will be presumed to remain with the original licensee whose stated intention was to serve the tribal land unless the parties to the transaction inform us otherwise. *Second Report and Order*, 18 FCC Rcd at 4780, para. 12.

¹⁹ *Second Report and Order*, 18 FCC Rcd at 4780, para. 13. The licensee is obligated to provide the total population of the tribal area covered by its license as well as the number of persons it is serving in the tribal area, or face repayment penalties and, potentially, license termination.

²⁰ *Second Report and Order*, 18 FCC Rcd at 4781, para. 14; see also 47 C.F.R. § 1.2110(f)(3)(vii) (2003).

²¹ *Second Report and Order*, 18 FCC Rcd at 4781-82, para. 16.

²² *Second Report and Order*, 18 FCC Rcd at 4782, para. 18.

proposal.²³

6. In its *Second Further Notice*, the Commission sought comment on four discrete issues. First, the Commission sought comment regarding whether it should reconsider or moderate the buildout obligations imposed on carriers in light of the lack of participation in the bidding credit program.²⁴ Next, the Commission asked for comments on whether and how the bidding credit limit and formula might be modified to provide greater incentive for carriers to deploy facilities on tribal lands.²⁵ The Commission also sought comment on whether it should adjust the bidding credit formula to incorporate data from the 2000 Census figures rather than the 1990 figures in calculating tribal penetration for purposes of determining eligibility for the credit.²⁶ Finally, the Commission sought comment on allowing carriers who obtain tribal lands bidding credits, to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that also have low penetration rates.²⁷ We address each of these issues, in turn, below.

III. DISCUSSION

A. Modifying the Construction Requirements of the Tribal Lands Bidding Credit

7. In the *Second Further Notice*, the Commission sought comment on modifying the requirement that, within three years of grant of a license, a carrier must cover 75 percent of the tribal area for which the bidding credit was awarded.²⁸ Given that our current rules impose more stringent construction requirements on carriers who seek the tribal lands bidding credit than those who do not, the Commission asked commenters to discuss whether such requirements should be eased, and if so, how.²⁹ Specifically, the Commission asked commenters to consider whether the 75 percent population coverage requirement should be lowered; whether the build-out requirement should be extended or otherwise modified; if certain geographic characteristics of a given tribal area make compliance with the construction requirement more difficult; whether different construction rules should apply to different wireless services; and whether buildout difficulties should be resolved on an *ad hoc* or waiver basis.³⁰

8. Although we received very limited comments in response to the *Second Further Notice*, commenters responding generally agreed that the Commission should not modify the current construction requirement.³¹ The Commission's underlying objective in applying the more stringent construction

²³ *Second Report and Order*, 18 FCC Rcd at 4782-83, para. 19.

²⁴ *Second Report and Order*, 18 FCC Rcd at 4783-84, paras. 22-24.

²⁵ *Second Report and Order*, 18 FCC Rcd at 4785, para. 26.

²⁶ *Second Report and Order*, 18 FCC Rcd at 4785-86, paras. 27-28. Notably, the 2000 Census indicated that average telephone penetration rates on tribal lands have increased appreciably from levels reported in 1990. *Id.* at 4786, para. 28 & n.46.

²⁷ *Second Report and Order*, 18 FCC Rcd at 4786-87, paras. 29-30.

²⁸ *Second Report and Order*, 18 FCC Rcd at 4783-84, paras. 22-24; *see also* 47 C.F.R. § 1.2110(f)(3)(vi) (2003).

²⁹ *Second Report and Order*, 18 FCC Rcd at 4783, para. 23.

³⁰ *Second Report and Order*, 18 FCC Rcd at 4783-84, paras. 22-24.

³¹ *See, e.g.*, Erratum Comments of the National Telecommunications Cooperative Association (NTCA Comments) at 1-2 (noting that there is no evidence that the more stringent buildout requirement causes under-utilization of the program, and stating that easing the rules would weaken the intended effect of the program and undercut the objective of promoting prompt deployment of spectrum-based services to tribal areas); Ex Parte Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority (Cheyenne River Reply Comments) at 2 (stating that the Commission should not lower the 75% population coverage requirement since it is not likely the cause of the under-utilization of the program); Navajo Nation Telecommunications Regulatory Commission (Navajo Nation) (continued....)

requirement was to encourage winning bidders that are committed to providing telecommunications services in Indian Country, and that will deploy those services rapidly.³² We continue to believe that the heightened requirement serves those dual purposes, and conclude that relaxing these requirements is not necessary to further the goals of the bidding credit program. In particular, the record, though limited, suggests that underutilization of the tribal lands bidding credit program stems from technical obstacles, economic factors, difficulties obtaining certifications, and other problems, rather than from overly-restrictive buildout requirements.³³ In addition, we note that tribal lands may vary significantly with regard to population density, terrain, and other such buildout factors which can affect the feasibility of building out facilities on tribal lands and account for the lack of service.³⁴ We note, too, that should a carrier be unable to fulfill its construction requirement at the end of three years, it may seek a waiver from the relevant Commission rule. Therefore, we shall not modify the construction requirement. Rather, as we stated in the *First Report and Order*, we strongly encourage parties to seek waivers of specific rules or file other requests for regulatory relief in those instances where greater flexibility than the rules allow would facilitate the provision of service to tribal lands.³⁵ Finally, we note that under appropriate and limited circumstances, the Commission, in order to further facilitate the provision of wireless services to Indian Country, may be flexible regarding the timing of granting an applicant's license and awarding tribal land bidding credits.³⁶

1. Applicant self-certification

9. With regard to our application requirements in general, we note that one commenter suggested that, in certain circumstances, applicant carriers, as opposed to tribal governments, should be allowed to certify compliance with basic eligibility requirements, particularly where the carrier will provide service to tribes from cell sites located adjacent to, but not on, tribal lands.³⁷ While we recognize that such self-certification may ease the coordination efforts necessary to obtain bidding credit approval, we have also recognized the unique sovereign status of Indian tribes, the trust relationship between the federal government and Indian tribes, and our ongoing federal obligation to guarantee the right of Indian

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Comments at 1-2 (stating that "there are no circumstances" that warrant relaxing the current buildout requirement); Whidbey Telephone Company (Whidbey) Reply Comments at 4, 6 (generally agreeing that current coverage and construction requirements should not be modified in such a way "as to create a windfall for licensees in exchange for little or no legal obligation" but suggesting that the Commission allow for creative service proposals or "tribal telecommunications improvement plans").

³² See *First Report and Order*, 15 FCC Rcd at 11,807, para. 35; *Second Further Notice*, 18 FCC Rcd at 4783, para. 21.

³³ See, e.g., Navajo Nation Comments at 1 (stating that "remoteness, low population density, rough terrain, or other factors negatively affect the ability of wireless carriers to provide the requisite coverage in [tribal land] areas"); Whidbey Reply Comments at 2-3 (enumerating problems with identifying and certifying certain tribal lands); Cheyenne River Reply Comments at 2-3 (noting that "the more likely cause of underutilized bidding credits is the fact that increasingly fewer Indian reservations have penetration rates of less than 70%").

³⁴ *First Report and Order*, 15 FCC Rcd at 11,808-09, para. 41.

³⁵ *First Report and Order*, 15 FCC Rcd at 11,808, para. 39.

³⁶ See, e.g., OP Corporation, FCC File No. 0001312627, "Request for Waiver," filed Jun. 23, 2003 (noting the exceptional nature of its single, nation-wide license, the Commission first granted OP Corporation's license and then allowed OP Corporation an additional year to secure the required tribal certifications. See *Order*, 18 FCC Rcd 19653 (2003).

³⁷ Windsong Comments at 6-8 (suggesting that an applicant is in as good a position as a tribal government to file the certifications required under 47 C.F.R. § 1.2110(f)(3)(ii)(1)-(3), and that the Commission may in fact have more clear enforcement authority regarding such certification when made by an applicant).

tribes to self-government.³⁸ Moreover, as we stated in our *Notice*, as a practical matter, applicants for tribal lands bidding credits are unlikely to be able to provide service to tribal lands without first obtaining the consent of the tribal governments to operate on tribal lands.³⁹ Accordingly, we do not find it prudent to exclude tribal authorities from any portion of the application process for access to telecommunications services that affect them so greatly. We therefore decline to adopt this proposal.

B. Increasing the Bidding Credit Limit

10. In the *Second Further Notice*, the Commission noted that it established the tribal lands bidding credit program to encourage participation in auctions by carriers that were in a position to provide service to tribal lands rapidly, and to help mitigate the costs associated with providing such service.⁴⁰ Observing that few applicants had taken advantage of the program, the Commission asked commenters whether the current credit amounts were adequate or whether the bidding credit limit, as presently structured, was insufficient for applicants to recover costs for building on tribal lands.⁴¹

11. When we initiated the tribal lands bidding credit program in 2000, we noted that our original bidding credit figures represented “our rough estimate of the approximate infrastructure costs (including site acquisition, tower construction, and equipment costs) for a representative tower facility.”⁴² We also acknowledged that while the formula was inexact, the credit would provide a financial incentive for carriers to deploy wireless facilities more efficiently.⁴³ We now believe that an increase in the bidding credit limit is warranted in order to further mitigate the economic risk associated with provision of service. Most parties commenting on this issue support the view that increasing the bidding credit amount could provide additional incentives to carriers to deploy wireless services to tribal lands.⁴⁴

12. We adopt the following formula for calculating the credit amount. A winning bidder may receive a \$500,000 credit for up to the first 200 square miles (518 square kilometers) of qualifying tribal land within its license area. In instances where qualifying tribal lands within a license area exceed 200 square miles (518 kilometers), a winning bidder may receive an additional \$2500 per square mile (2.59 square kilometer), or \$500,000 for each additional 200 square miles (518 square kilometers). All credits will be subject to a maximum limit based on the gross bid amount for the license for which the credit is

³⁸ See Extending Wireless Telecommunications Services to Tribal Lands, WT Docket 99-266, *Notice of Proposed Rulemaking*, 14 FCC Rcd 13679, 13,695-96, para. 41 (1999) (“*Notice*”).

³⁹ *Notice*, 14 FCC Rcd at 13,695-96, para. 41.

⁴⁰ *Second Further Notice*, 18 FCC Rcd at 4785, para. 25.

⁴¹ Presently, a winning bidder may receive a \$300,000 credit for up to the first 200 square miles (518 square kilometers) of qualifying tribal land within its license area. In instances where qualifying tribal lands within a license area exceed 200 square miles, a winning bidder may receive an additional \$1500 per square mile (2.59 square kilometer), or \$300,000 for each additional 200 square miles. All credits are subject to a maximum limit based on the gross bid amount for the license for which the credit is sought. 47 C.F.R. § 1.2110(f)(3)(iii)-(iv) (2003); see also *Second Further Notice*, 18 FCC Rcd at 4785, para. 26 & n.41.

⁴² *First Report and Order*, 15 FCC Rcd at 11,804, para. 25.

⁴³ *First Report and Order*, 15 FCC Rcd at 11,802, para. 27.

⁴⁴ See, e.g., Navajo Nation Comments at 2 (urging a modification of the bidding credit amount and methodology to ensure that remote areas within tribal lands are also served); NTCA Comments at 2 (noting that steps such as indexing the credit to inflation would ensure that the real value of the credit does not decline over time); Whidbey Reply Comments at 5-6 (noting that increasing the bidding credit amount would clearly provide licensees greater financial incentive to pursue the credit, but that this alone does not address other factors that may also stymie participation); Duluth PCS, Inc., West Virginia PCS, Inc., St. Joseph PCS, Inc., collectively dba Windsong PCS (“Windsong”) Comments at 4-6 (recommending that the Commission offer existing wireless service providers relief from future installment payments in the amount of the bidding credit in return for extending service to tribal lands).

sought. Where the gross bid amount is \$1 million or less, the cap will be 50 percent of the gross bid. Where the gross bid amount is greater than \$1 million and equal to or less than \$2 million, the cap will be \$500,000. Finally, where the gross bid amount exceeds \$2 million, the cap will be 35 percent of the gross bid.

13. We believe today's action will provide an additional financial incentive for carriers to participate in this program. Increasing the bidding credit amount should serve to attract entities that are both willing and able to deploy facilities and provide wireless services to Indian Country. In addition, we note that the Commission set forth a waiver process in the *First Report and Order* by which applicants could request additional bidding credits if they could demonstrate that their infrastructure costs exceeded the available credit set out by the formula.⁴⁵ Today's action, combined with our tribal lands bidding credit waiver procedure, is another indication of the seriousness with which we approach the subject of providing telecommunications service to underserved Americans.

C. Adjustment of the Eligibility Criteria Based on 2000 Census Data

14. In the *Second Further Notice*, the Commission noted that the statistics used in the initial notice for the tribal lands bidding credit program cited 1990 Census data, which showed that basic telecommunications service to Indian Country generally was well below the national average.⁴⁶ The Commission sought comment on the advisability of using data from the 2000 Census, which indicated that average telephone penetration rates on tribal lands increased markedly during the 1990s.⁴⁷ The Commission asked how that new information should be incorporated into the bidding credit formula, *i.e.*, should the wireline penetration benchmark be somewhere between its present 70 percent but some percentage below the national rate?⁴⁸ The Commission also questioned whether the program should be tailored to target those tribal areas that continue to have unusually low penetration rates.⁴⁹

15. Statistics from the 1990 Decennial Census estimated that 46.6 percent of all American Indian household on American Indian reservations and Federal Off-Reservation Trust Lands had telephone service.⁵⁰ Comparable data from the 2000 Decennial Census estimated that 67.9 percent of such American Indian households had telephone service.⁵¹ Data also indicates that only a little over ten percent of tribes now have a penetration rate of 70 percent or less (as compared to 60 percent in 1990), demonstrating considerable growth of telephone service in Indian Country.⁵²

16. While the increased rates in penetration, subscribership, and facilities deployment reflect the Commission's resolve in assuring that all Americans, including those living in Indian Country, have

⁴⁵ *First Report and Order*, 15 FCC Rcd at 11,805, para. 31.

⁴⁶ *Second Further Notice*, 18 FCC Rcd at 4785, para. 27 & n.43 (citing *Notice*, 14 FCC Rcd at 13,682, para. 5).

⁴⁷ *Second Further Notice*, 18 FCC Rcd at 4785-86, para. 28.

⁴⁸ *Second Further Notice*, 18 FCC Rcd at 4785, para. 27 & n.45; see also *Second Report and Order*, 18 FCC Rcd at 4786, para. 28.

⁴⁹ *Second Further Notice*, 18 FCC Rcd at 4786, para. 28.

⁵⁰ See "Telephone Subscribership on American Indian Reservations and Off-Reservation Trust Lands" ("American Indian Telephone Subscribership"), Industry Analysis and Technology Div., Wireline Competition Bur., Federal Communications Commission (rel. May 2003), available at <http://www.fcc.gov/wcb/stats>.

⁵¹ See "American Indian Telephone Subscribership."

⁵² See "List of Federally Recognized Tribal Lands and Telephone Penetration Rates," ("Tribal Telephone Penetration Rates"), available at http://wireless.fcc.gov/auctions/data/crossreferences/Auctions_2000_1990_TL&TelephonePenetrationRate.xls; see also Windsong Comments at 9 & note 13 (noting that "overall penetration rates are now higher than 70% in all but two states, Mississippi and Utah").

the benefits of access to basic telecommunications services, we note, nevertheless, that well over half of tribes continue to have penetration rates below our national average.⁵³ As such, we recognize that more can be done to increase access to telecommunications and information services in Indian Country and that it is continually appropriate to develop and apply policies aimed at promoting further deployment of wireless services to tribal lands.

17. Accordingly, we believe that it is appropriate to raise the telephone penetration level at which tribal lands are eligible for a credit. At the current 70 percent benchmark, based on the 2000 Census data, only a few dozen (out of nearly 450) federally recognized tribal lands would qualify under our rules for a tribal lands bidding credit.⁵⁴ That is, maintaining the 70 percent benchmark will exclude approximately 90 percent of tribal lands from the bidding credit program. It is appropriate then, given the overall increase in tribal lands telephone penetration rates, to adjust the telephone penetration benchmark from 70 percent to a level that serves to increase the number of “qualifying tribal lands” while still targeting those tribal communities with the greatest need for access to telecommunications service.⁵⁵ We note that with regard to this issue, commenters, though few in number, consistently urged the Commission to increase the penetration rate threshold to broaden the applicability of the program.⁵⁶

18. We conclude that raising the wireline telephone penetration benchmark from 70 to 85 percent will provide a greater incentive for carriers to deploy facilities on tribal lands, while at the same time increasing the number of qualifying tribal lands eligible for this bidding credit program.⁵⁷ We note that almost 35 percent of tribal areas continue to endure telephone penetration rates of 85 percent or less; the change we are making in this program will increase by threefold the number of tribal lands deemed eligible for tribal lands bidding credit, and will encourage carriers to reach out to those tribes and deploy telecommunications facilities.⁵⁸ We also believe that an 85 percent benchmark for tribal lands bidding credit eligibility represents a balance between our efforts to expand the scope of, and encourage participation in, the existing tribal lands bidding credit program, with the Commission’s objective to target those tribal communities with the greatest need for access to telecommunications services. Therefore, we shall amend our rule accordingly.⁵⁹

⁵³ See “Tribal Telephone Penetration Rates.”

⁵⁴ See “Tribal Telephone Penetration Rates.” We note that our rules already require the use of the most recently available U.S. Census Data in determining whether a qualifying tribe has a wireline telephone subscription rate of 70% or less. See 47 C.F.R. § 1.2110(f)(3)(i) (2003).

⁵⁵ See *Second Report and Order*, 18 FCC Rcd at 4778, para. 7.

⁵⁶ See Cheyenne River Reply Comments at 3 (noting that the number of tribal lands within the 70% penetration eligibility bracket is rapidly diminishing); NTCA Comments at 2-3 (stating that the 70% “restriction” may pose a barrier to application of the bidding credit, and noting that the low threshold limits the number of tribal areas that meet the rule’s qualifications); Navajo Nation Comments at 2-3 (suggesting that increasing the penetration rate will encourage large carriers to offer services on Navajo Nation tribal lands); Whidbey Reply Comments at 7 (stating that increasing the penetration rate would allow for the extension of basic telecommunications services to underserved portions of tribal lands); Windsong Comments at 8-10 (suggesting that any tribal area with a penetration rate below the national average is “underserved” and should thus be eligible for the tribal lands bidding credit program).

⁵⁷ We emphasize, however, that in order to provide greater access to wireless services to Indian Country, we may at some later point seek to redefine the benchmark used in the tribal lands bidding credit formula using different methodology.

⁵⁸ See “Tribal Telephone Penetration Rates.”

⁵⁹ We reiterate that the tribal lands bidding credit program continues to apply only to future auctions, and the Commission will “not extend the program to already-licensed carriers or make the credit transferable” *Second Report and Order*, 18 FCC Rcd at 4782, para. 18.

D. Extending the Tribal Lands Bidding Credit to Adjacent Non-Tribal Areas with Low Penetration Rates

19. The Commission sought comment on a limited expansion of the bidding credit program that would allow carriers who obtain tribal lands bidding credits to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that have comparably low penetration rates.⁶⁰ The Commission noted that certain areas abutting tribal lands often share the same characteristics as tribal lands (e.g., significant Native American population, income levels, terrain, etc.), but do not otherwise qualify for the tribal lands bidding credit.⁶¹ In particular, we requested that commenters discuss how to define the geographic areas eligible for an additional credit, the appropriate certification process, and any other measures or conditions that should be adopted to safeguard the integrity of the process.⁶² The Commission also requested comment on its legal authority to extend the bidding credit in such a way.⁶³

20. While we continue to seek ways to extend telecommunications service to all Americans, including providing incentives to carriers that will serve areas that might otherwise be neglected, we will not extend the bidding credit program to adjacent non-tribal areas at this time. First, we note that, using Census tract data, the number of immediately adjacent non-tribal areas that would qualify for such a bidding credit (i.e., a tract wholly outside tribal lands with a telephone penetration rate equal to or less than eighty-five percent) is negligible.⁶⁴ In particular, an estimated two percent of census tracts wholly outside but immediately adjacent to tribal lands have a telephone penetration rate equal to or less than 85 percent.⁶⁵ Accordingly, it does not appear that expanding the bidding credit program to adjacent non-tribal areas with low penetration rates would have any marked impact on increased subscribership or facilities deployment for those areas. Additionally, we remain concerned about both the dearth of comments, and the lack of specificity in the comments provided on this topic.⁶⁶ Further, we note that we continue to explore other avenues to provide telecommunications service to rural areas, including lands immediately abutting tribal lands.⁶⁷ Finally, we note that nothing in our rules prevents a licensee that has been awarded a tribal lands bidding credit from providing service to immediately adjacent, non-tribal areas. Therefore, we decline to extend the tribal lands bidding credits beyond its present scope to adjacent non-tribal areas.

⁶⁰ *Second Further Notice*, 18 FCC Rcd at 4786-87, paras. 29-30.

⁶¹ *Second Further Notice*, 18 FCC Rcd at 4787, para. 30.

⁶² *Second Further Notice*, 18 FCC Rcd at 4787-88, paras. 31-33.

⁶³ *Second Further Notice*, 18 FCC Rcd at 4788, para. 35.

⁶⁴ See 2000 Census Tract Data. Census tracts are small, relatively permanent statistical subdivisions of a county or statistically equivalent entity which are delineated by the U.S. Census Bureau where no local participant existed or where a local or tribal government declined to participate. U.S. Census Bureau, Census 2000.

⁶⁵ See 2000 Census Tract Data.

⁶⁶ See, e.g. NTCA Comments at 3-4 (supporting an extension of the bidding credit program to adjacent underserved areas where adjacent areas are remote rural areas with unique barriers to telecommunications access); Navajo Nation Comments at 3 (suggesting that the Commission allow qualifying applicants to increase their bidding credit for also serving adjacent non-tribal areas); Cheyenne River Reply Comments at 6; Whidbey Reply Comments at 6; Windsong Comments at 10, note 15.

⁶⁷ See, e.g., In the Matter of Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Service, WT Docket No. 02-381, 2000 Biennial Review Spectrum Aggregation Limits for Commercial Mobile Radio Service, WT Docket No. 01-14, Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation, *Notice of Proposed Rulemaking*, 18 FCC Rcd 20,802 (2003).

IV. CONCLUSION

21. In adopting the limited changes set forth in this *Third Report and Order*, we continue to strive to fulfill our obligation to provide greater access to telecommunications service to all Americans, particularly those in Indian Country. We encourage auction winning bidders to continue to negotiate with tribal leaders in order to bring the promise and benefits of quality telecommunications services to tribal lands. Through policy reform, outreach efforts, and consultations with tribes, the Commission has, and will continue to address telecommunications service-related issues on tribal lands.⁶⁸ We are encouraged by the considerable increase in telephone penetration rates overall on tribal lands over the past ten years, and will continue to work to promote telecommunications subscribership and infrastructure deployment within American Indian and Alaska Native tribal communities.

A. Final Regulatory Flexibility Analysis

22. As required by the Regulatory Flexibility Act of 1980, as amended,⁶⁹ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible impact on small entities of the action taken in this *Third Report and Order*. The FRFA is set forth in Appendix B.

B. Paperwork Reduction Act Analysis

23. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.⁷⁰

⁶⁸ Indeed there are various programs, in addition to the tribal lands bidding credit program, which the Commission has initiated to increase telephone subscribership in Indian Country. In particular, the Commission continues to promote Enhanced Lifeline, Link-Up, and other universal service-related programs targeted specifically toward tribal lands, and continues to promote and encourage participation in Indian Telecommunications Initiatives, a series of interactive workshops and roundtables, with the goal of increasing the telephone penetration rate, facilitating deployment of telecommunications infrastructure on tribal lands, and informing Tribes about federal government programs. See Federal Communications Commission Tribal Home Page <<http://www.fcc.gov/indians>>. The Commission also has an open rulemaking proceeding on extending Enhanced Lifeline and Link-Up to areas near reservations in order to target such assistance to the most underserved areas of the Nation. See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas; Commonwealth of Northern Mariana Islands; Petitions for Reconsideration filed by: Crow Tribal Council, Florida Public Service Commission, Fort Belknap Indian Community, Goshute Indian Reservation, National Telephone Cooperative Association, Oglala Sioux Tribe, Rosebud Sioux Tribe, South Dakota Independent Telephone Coalition, Western Wireless Corporation, *Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 18 FCC Rcd 10,958 (2003).

⁶⁹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁷⁰ See 44 U.S.C. 3506(c)(4).

V. ORDERING CLAUSES

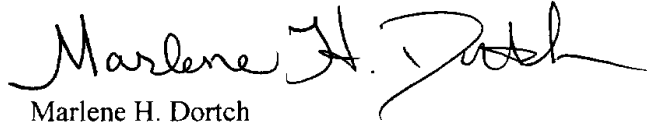
24. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), and 309(j), the REPORT AND ORDER is hereby ADOPTED.

25. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 303(c), 303(f), 303(g), 303(r), and 332, the rule changes specified in Appendix A ARE ADOPTED.

26. IT IS FURTHER ORDERED that the rule changes set forth in Appendix A WILL BECOME EFFECTIVE 60 days after publication in the *Federal Register*.

27. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Third Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Marlene H. Dortch", is written over the printed name.

Marlene H. Dortch
Secretary

APPENDIX A

RULES

Subpart Q of Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 1.2110(f)(3) is amended to read as follows:

§ 1.2110 Designated Entities.

* * * * *

(f) * * *

* * * * *

(3) * * *

(i) Qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data.

* * * * *

(iii) *Bidding credit formula.* Subject to the applicable bidding credit limit set forth in §1.2110(f)(3)(iv), the bidding credit shall equal five hundred thousand (500,000) dollars for the first two hundred (200) square miles (518 square kilometers) of qualifying tribal land, and twenty-five hundred (2500) dollars for each additional square mile (2.590 square kilometers) of qualifying tribal land above two hundred (200) square miles (518 square kilometers).

(iv) *Bidding credit limit.* If the high bid is equal to or less than one million (1,000,000) dollars, the maximum bidding credit calculated pursuant to §1.2110(f)(3)(iii) shall not exceed fifty (50) percent of the high bid. If the high bid is greater than one million (1,000,000) dollars, but equal to or less than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to §1.2110(f)(3)(iii) shall not exceed five hundred thousand (500,000) dollars. If the high bid is greater than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to §1.2110(f)(3)(iii) shall not exceed thirty-five (35) percent of the high bid.

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁷¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *First Report and Order and Further Notice of Proposed Rulemaking (First Report and Order/First Further Notice)*⁷² and the *Second Report and Order and Further Notice of Proposed Rulemaking (Second Report and Order/Second Further Notice)*.⁷³ The Commission sought written public comment on the proposals in the *First Further Notice* and *Second Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁷⁴

A. Need for, and Objectives of, the Third Report and Order.

In the *Third Report and Order*, we modify rules previously adopted in the *First Report and Order* in WT Docket 99-266 to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands.⁷⁵ In that proceeding, we authorized the grant of bidding credits to winning bidders who deploy facilities and provide service to federally-recognized tribal areas that have a wireline telephone subscription rate equal to or below 70 percent.⁷⁶ In the present item, we amend section 1.2110(f)(3)(i) of the Commission's rules to increase the wireline telephone subscription rate for a qualifying tribal land to equal to or less than 85 percent with the intention of increasing participation in the bidding credit program; we also amend sections 1.2110(f)(3)(iii) and (iv) to increase the bidding credit available to applicants that deploy facilities on and provide wireless services to qualifying tribal lands. The objective of these actions, and of this *Third Report and Order*, is to address the need to provide incentives for carrier to provide wireless telecommunications services on generally underserved tribal lands. This *Third Report and Order* also addresses issues raised in the *Second Further Notice of Proposed Rulemaking*. In the *Second Further Notice*, we requested comment on whether we should expand the use of bidding credits. Specifically, we sought comment as to whether to: 1) modify the program's construction requirements; 2) increase the bidding credit limit; 3) adjust the eligibility criteria based on data from the 2000 Census; and 4) allow carriers who obtain tribal lands bidding credits, to obtain additional credit for extending their coverage to immediately adjacent non-tribal areas that also have low penetration rates.

⁷¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Title II, Pub. L. No. 104-121, 110 Stat. 857 (1996).

⁷² In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11,794 (2000).

⁷³ In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775 (2003).

⁷⁴ See 5 U.S.C. § 604.

⁷⁵ Section 1.2110(f)(3)(i) of the Commission's rules provides that a qualifying tribal land "means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments," (see 25 C.F.R. § 20.1(v)), that has a wireline telephone subscription rate to or less than seventy (70) percent based on the most recently available U.S. Census Data." 47 C.F.R. § 1.2110(f)(3)(i).

⁷⁶ The "telephone penetration rate," or telephone subscribership rate, represents the actual percentage of households that subscribe to telephone service. See *Telephone Subscribership in the United States* (rel. January 2004), available at <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/recent.html>.

We believe that increasing the wireline telephone subscription rate at which tribal lands are eligible for a bidding credit to 85 percent or less, will have the affect of increasing participation in the program by increasing the number of qualifying tribes and providing additional incentives to carriers to enter into agreements with tribal governments to deploy wireless services within Indian Country. We also believe that increasing the amount of bidding credit available will provide additional incentives to prospective wireless providers in Indian Country. Regarding the other issues raised, we believe that the lack of a record supporting the proposed changes in the rules, as well as the availability of *ad hoc* or waiver process remedies, make it inappropriate to adopt those proposals as rules at this time. Specifically, we do not believe that modifying the construction requirements or extending the bidding credit to adjacent, non-tribal lands will further the objectives of this *Third Report and Order*.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.

No comments were filed that specifically addressed the rules and policies proposed in the IRFA.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.⁷⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷⁸ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁷⁹ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁸⁰

Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”⁸¹ Under that SBA category, a business is small if it has 1,500 or fewer employees.⁸² According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.⁸³ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA’s definition. In addition, we note that there are 1807 cellular licenses; however, a cellular licensee may own several licenses. According to the most recent *Trends in Telephone Service* data, 858 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or

⁷⁷ 5 U.S.C. § 604(a)(3).

⁷⁸ 5 U.S.C. § 601(6).

⁷⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁸⁰ 15 U.S.C. § 632.

⁸¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513322.

⁸² *Id.*

⁸³ U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

Specialized Mobile Radio telephony services, which are placed together in that data.⁸⁴ We have estimated that 291 of these are small under the SBA small business size standard.⁸⁵ Accordingly, based on this data, we estimate that not more than 291 cellular service providers will be affected by these revised rules.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to “Cellular and Other Wireless Telecommunication” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.⁸⁶ According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.⁸⁷ If this general ratio continues in 2002 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's small business standard.

220 MHz Radio Service – Phase II Licensees. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁸⁸ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁸⁹ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.⁹⁰ The SBA has approved these small size standards.⁹¹ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.⁹² In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 683 were sold.⁹³ Thirty-nine small businesses won

⁸⁴ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

⁸⁵ *Id.* Data found in *Trends in Telephone Service* is based on information filed by service providers on FCC Form 499-A worksheets, in combination with employment information obtained from ARMIS and Securities and Exchange Commission filings as well as industry employment estimates published by the Bureau of Labor Statistics.

⁸⁶ 13 C.F.R. § 121.201, NAICS code 513322.

⁸⁷ U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 513322 (October 2000).

⁸⁸ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997) (*220 MHz Third Report and Order*).

⁸⁹ *Id.* at para. 291.

⁹⁰ *Id.*

⁹¹ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

⁹² See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

⁹³ “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.⁹⁴

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁹⁵ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁹⁶ Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁹⁷ An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.⁹⁸ Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.⁹⁹

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.¹⁰⁰ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 704 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings [EAGs]) commenced on August 27, 2002, and closed on September 18, 2002.¹⁰¹ Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

Private and Common Carrier Paging. In the *Paging Second Report and Order*, we adopted a small size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹⁰² A small business is an entity that, together with its

⁹⁴ “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

⁹⁵ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

⁹⁶ *Id.* at para. 133.

⁹⁷ *Id.*

⁹⁸ See generally “220 MHz Service Auction Closes: Winning Bidders In the Auction of 908 Phase II 220 MHz Service Licenses,” *Public Notice*, DA 98-2143 (rel. October 23, 1998).

⁹⁹ “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC 4590 (WTB 2001).

¹⁰⁰ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002).

¹⁰¹ See “Lower 700 MHz Band Auction Closes,” 17 FCC Rcd 17272 (2002).

¹⁰² Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second* (continued....))

affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹⁰³ The SBA has approved this definition.¹⁰⁴ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000.¹⁰⁵ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 carriers reported that they were engaged in the provision of either paging or "other mobile" services.¹⁰⁶ Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁰⁷ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁰⁸ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁰⁹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.¹¹⁰ On March 23, 1999, the Commission reaucted 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 48 winning bidders in the re-auction, for a total of 231 small entity PCS providers as defined by the SBA small business standards and the Commission's auction rules. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses.

(...continued from previous page)

Report and Order); see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, paras. 98-107 (1999).

¹⁰³ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

¹⁰⁴ See Letter to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹⁰⁵ See generally "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

¹⁰⁶ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 - Number of Telecommunications Service Providers that are Small Businesses (May 2002).

¹⁰⁷ See Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, paras. 57-60 (1996); see also 47 C.F.R. § 24.720(b).

¹⁰⁸ See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, para. 60 (1996).

¹⁰⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Small Business Administration, dated December 2, 1998.

¹¹⁰ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. January 14, 1997).

Narrowband PCS. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. In March 2002, 106 MTA and BTA narrowband PCS licenses were granted to 4 licensees.¹¹¹ Each of the licensees are small or very small businesses.

Specialized Mobile Radio (SMR). Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has established a small business size standard for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of \$15 million or less in the three preceding calendar years.¹¹² The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions.¹¹³ Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small business. In addition, there are numerous incumbent site-by-site SMR licensees on the 800 and 900 MHz band. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than \$15 million in each of the three previous calendar years.¹¹⁴ This analysis applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by SBA.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

The *Third Report and Order* modifies a basic qualification for participation in the tribal lands bidding credit program. The Commission increases the wireline telephone subscription rate for an area to qualify for the tribal lands bidding credit from 70 percent or less to 85 percent or less. The Commission also increases the amount of bidding credit available that may be awarded to auction high bidders for deploying facilities on and providing service to qualifying tribal lands. The Commission does not propose any additional reporting, recordkeeping or compliance requirements.

¹¹¹ See "Wireless Telecommunications Bureau Announces It is Prepared to Grant 109 Narrowband PCS Auction Licenses Upon Full And Timely Payment," *Public Notice*, 17 FCC Rcd 1559 (WTB 2002).

¹¹² 47 C.F.R. § 90.814(b)(1).

¹¹³ See Letter to Tom Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

¹¹⁴ 47 C.F.R. § 90.814(b)(1).

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small Entities.¹¹⁵

In the *Third Report and Order*, we first decline to modify the current construction requirements for a licensee that has been awarded a bidding credit for serving qualifying tribal lands, believing that the Commission's underlying objective (rapid deployment to underserved Indian Country) is best served by the current rules; this action will have no significant impact on small entities. Next, we increase the amount of bidding credit to 500,000 dollars for the first 200 square miles of qualifying tribal lands, and 2,500 dollars for each additional square mile above the first 200 square miles; this action will have no significant negative impact on small entities. While the Commission considered leaving the existing bidding credit amount in place, we determined that increasing the bidding credit amount would provide a greater incentive for carriers and may benefit small entities that are capable of providing wireless services to Indian Country. We also set the wireline telephone subscription rate for a qualifying tribal land at 85 percent or less, in order to increase the number of tribes whose lands qualify for the bidding credit; this action will have no significant impact on small entities. While the Commission considered implementing a benchmark above 85 percent or leaving the benchmark at 75 percent, we concluded that an 85 percent benchmark represents a balance between our efforts to expand the scope of, and encourage participation in, the existing tribal lands bidding credit program, with the Commission's objective to target tribal communities with the greatest need for access to telecommunications services. Finally, we decline to extend the tribal lands bidding credit to carriers serving adjacent, non-tribal lands, as we believe such action does not further the objective of this program; this action will not have a significant economic impact on small entities.

Report to Congress: The Commission will send a copy of the *Third Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the *Congressional Review Act*.¹¹⁶ In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Third Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.¹¹⁷

¹¹⁵ 5 U.S.C. § 603 (c).

¹¹⁶ See 5 U.S.C. § 801(a)(1)(A).

¹¹⁷ See 5 U.S.C. § 604(b).

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: Extending Wireless Telecommunications Services to Tribal Lands, Third Report and Order (WT Docket No. 99-266).

The FCC has a special responsibility to increase telephone penetration rates in tribal lands. Access to telecommunications services on tribal lands continues to lag significantly behind other parts of the country despite our current efforts. Because we must work harder to erase this gap, I support increasing the tribal lands bidding credit and adjusting our eligibility criteria so that bidding credits are available for spectrum associated with tribal lands where penetration rates are lower than 85 percent rather than 70 percent. We must remember that penetration rates are still far lower than these levels in many tribal areas. I hope that these two changes make serving tribal areas more attractive to bidders and result in increased service.

I am disappointed, however, that we have not found a way to make bidding credits available in adjacent, non-tribal areas. This is a change that both wireless companies and tribal organizations have indicated could make a difference. This issue has lingered too long, and we must strive to work with tribal representatives and industry experts to find creative solutions for this and other challenges. Nonetheless, this Order is another step forward, so I support it.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Extending Wireless Telecommunications Services to Tribal Lands; WT Docket No. 99-266

I was very pleased to work with the Wireless Telecommunications Bureau on the development of the Second Further Notice of Proposed Rulemaking in this proceeding last year because I was concerned about the apparent lack of interest in the Commission's tribal lands bidding credit program. Hailing from South Dakota, I have a particular interest in ensuring that the benefits of wireless telecommunications reach all Americans, particularly those who live on tribal lands.

It obviously is difficult to pinpoint with any certainty specific aspects of the tribal lands bidding credit program that need to be adjusted to ensure the success of the program. I believe that by our decision today, however, we are adopting modifications that make great strides to ensuring that the credit is utilized to its fullest possible extent in the near future. For example, the decision to raise the wireline telephone penetration benchmark from 70 to 85 percent for qualifying tribal lands will triple the number of tribal lands deemed eligible for bidding credits. Similarly, we adopt a two-thirds increase to the bidding credit limit to further incentivize investment in these underserved areas.

I applaud the work of the Bureau in developing these adjustments to the tribal lands bidding credit program. These changes are particularly appropriate as we plan to hold a number of significant auctions over the next few years. As an agency, we must be ever vigilant to support the deployment of wireless services in tribal areas, particularly those that are underserved by traditional wireline services.

Finally, I wanted to note that in the past, I heard anecdotal concerns regarding the challenges of meeting the 75 percent population coverage construction requirement of the tribal lands bidding credit within three years of grant of a license. However, the record before us is clear that the construction requirement should be maintained, and is not likely the cause of the under-utilization of the bidding credit program. While we decline to modify the construction requirement, I am pleased that we reiterate the Commission position that parties can file for waiver requests should their particular circumstances require additional construction time.